

**DISTRICT COURT JUDGE  
12<sup>th</sup> JUDICIAL DISTRICT**

8. List any scholarships, awards, honors and citations you have received:

Undergraduate degree with honors – University of Montana 1980

9. Were you a member of the Law Review? If so, please state the title and citation of any article which was published and the subject area of the article.

I was not a member of the Law Review.

### C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana State Court	09/27/1984
Rocky Boy Tribal Court	1984
U.S. District Court for Montana	09/09/1986
Fort Belknap Tribal Court	1986

11. Indicate your present employment (list professional partners or associates, if any).

Regional Deputy Public Defender, Region 6, Office of State Public Defender

Law Offices of Altman & Boucher

12. State the name, dates and addresses of all law firms with which you have been associated in practice, and of all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Law Office of Frank Altman P. O. Box 268, Havre, MT 59501	Associate	08/1984
Law Office of Altman & Boucher P. O. Box 268, Havre, MT 59501	Partner, then sole practitioner	08/1987-current

Hill County Attorney's Office  
315 Fourth Street, Havre, MT 59501

Deputy Co. Atty. (part time) 2002-03 (9 mos.)

Montana Office of State Public Defender  
P. O. Box 268, Havre, MT 59501

Regional Deputy  
Public Defender 05/2006-current

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

Not applicable.

14. Describe the nature of your present law practice, listing the major types of law you practice and the percentage each constitutes of your total practice.

My current practice primarily focuses on providing public defense services for the 12th and 17th Judicial Districts. This includes District Courts and all courts of limited jurisdiction. Services are provided for criminal, traffic, involuntary commitments, youth court, abuse and neglect cases and guardianship actions. As Regional Deputy, I oversee one full-time public defender and several attorneys providing services on a contract basis. This constitutes approximately 90% of my practice. My mediation services consume the next greatest part of my time.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

During my practice of 26 years, I have gained experience in construction litigation, personal injury, family law, administrative law, real estate, estate and probate, and formation of business entities. I also provide mediation services on a very frequent basis.

16. If you specialize in any field of law, what is your specialty?

As a result of my position with the Office of Public Defender, I currently specialize in issues related to that area. Prior to the current position, I was very involved litigating family law, personal injury and construction cases.

17. Do you regularly appear in court? Yes

What percentage of your appearance in the past five years were in:

Federal Court	0 %
State or local courts of record	60 %
Administrative bodies	1 %
Other	39 %

18. During the past five years, what percentage of your practice has been trial practice? 90 %
19. How frequently have you appeared in court? 20+ times per month on average.
20. How frequently have you appeared at administrative hearings? 0 to 1 times per month on average.
21. What percentage of your practice involving litigation has been:

Civil	35 %
Criminal	65 %
Other	%

22. Have you appeared before the Montana Supreme Court within the past five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

I appeared before the Montana Supreme Court in two cases decided within the last five years. Both were appeals involving criminal cases.

1. *State of Montana v. Bridgette Morse*, 2006 MT 54; opposing counsel Mike McGrath and Micheal S. Wellenstein, Office of the Montana Attorney General, P. O. Box 201401, Helena, MT 59620, tel. 406.444.2026

2. *State of Montana v. Edward L. Schmidt*, 2005 MT 339; opposing counsel Barbara C. Harris, Office of the Montana Attorney General, P. O. Box 201401, Helena, MT 59620, tel. 406.444.2026

23. State the number of jury trials you have tried to conclusion in the past ten years. 10 to 15
24. State the number of non-jury trials you have tried in the past ten years. 15 to 20
25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

During the last two years I have continued to serve as Regional Deputy Public Defender for the six-county region of the 12th and 17th Judicial Districts. As such, the cases are too numerous to list. However, following is a list of prosecutors I have litigated against as well as the judges in whose courts we have appeared.

Gina Dahl  
Hill County Attorney  
315 Fourth Street  
Havre, MT 59501

Judge David G. Rice, 406.265.5481  
Judge Terry Stoppa, 406.265.5481

Tamara L. Barkus  
Havre City Prosecutor  
P. O. Box 1512  
Havre, MT 59501

Judge Margaret Hencz, 406.265.8575

Donald A. Ranstrom  
Blaine County Attorney  
P. O. Box 1567  
Chinook, MT 59523

Judge John C. McKeon, 406.654.1062  
Judge Perry Miller, 406.357.2335

Mark Harshman  
Chinook and Harlem City Attorney  
P. O. Box 1594  
Chinook, MT 59523

Judge Perry Miller, 406.357.2335

Stephen A. Gannon  
Chouteau County Attorney  
P. O. Box 459  
Fort Benton, MT 59442

Judge David G. Rice, 406.265.5481  
Judge Susan Spencer, 406.622.5502

Ed Amestoy  
Phillips County Attorney  
P. O. Box 1279  
Malta, MT 59538

Judge John C. McKeon, 406.654.1062  
Judge Gayle Stahl, 406.654.1118

Dan O'Brien  
Malta City Attorney  
P. O. Box 1279  
Malta, MT 59538

Judge Gayle Stahl, 406.654.1118

Nickolas C. Murnion  
Valley County Attorney  
501 Court Square #20  
Glasgow, MT 59230

Judge John C. McKeon, 406.654.1062  
Judge Linda Hartsock, 406.228.6271

C. David Gorton  
Glasgow & Fort Peck City Attorney  
P. O. Box 215  
Glasgow, MT 59230

Judge David Riggin, 406.228.2389  
Judge Linda Hartsock, 406.526.3220

Additionally, in the last two years I have litigated against the following attorneys in a wide variety of civil matters:

Steven Brown, Jr.  
Brian Lilletvedt  
Keith Maristuen  
Bosch, Kuhr, Dugdale, Martin & Kaze, PLLP

Judge David G. Rice, 406.265.5481  
Judge Terry Stoppa, 406.265.5481  
Judge John C. McKeon, 406.654.1062

P. O. Box 7152  
Havre, MT 59501

Marta N. Farmer  
Suite 212  
305 Third Avenue  
Havre, MT 59501

Judge David G. Rice, 406.265.5481

Thomas Sheehy  
P. O. Box 511  
Big Sandy, MT 59520

Judge David G. Rice, 406.265.5481

Jeremy S. Yellin  
P. O. Box 564  
Havre, MT 59501

Judge David G. Rice, 406.265.5481

Chris R. Young  
P. O. Box 1070  
Havre, MT 59501

Judge David G. Rice, 406.265.5481

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have appeared in administrative proceedings conducted by the Department of Health and Human Services Child Support Enforcement Division.

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at Continuing Legal Education seminars or otherwise, please state the date, topic and group to which you spoke.

Not applicable.

#### **D. PROFESSIONAL AND PUBLIC SERVICE**

28. List all the bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Montana Bar Association, September 1984 to present  
12th Judicial District Bar Association, 1984 to present, served as Vice President 1988 and 1989

I have previously been a member of the ABA, Montana Association of Criminal Defense Lawyers, and National Association of Criminal Defense Lawyers.

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the past five years. Please state the title and date of any office you have held in each such organization. If you held any offices, please describe briefly your activities in the organization.

Montana Officials Association, 1977 to present

Havre Wrestling Officials Association (HWOA), 2005 to present, President

As President of HWOA, I coordinate with area schools to provide officials for their events. I establish training goals and sessions for the improvement of individual officials.

30. Have you ever run for, or held, public office? If so please give the details.

I have not held any public office. In 2004 I unsuccessfully ran against an incumbent Hill County Attorney in the primary election.

### **E. PROFESSIONAL CONDUCT AND ETHICS**

31. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No.

32. Have you ever been found guilty of contempt of court, or sanctioned by any court for any reason? If so, please explain.

No.

33. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

No.

34. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involve moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No.

35. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court, that would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

No.

## F. BUSINESS AND FINANCIAL INFORMATION

36. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

No.

37. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment to District Court Judge.

Not applicable.

38. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization, If so, please identify the source and the approximate percentage of your total income it constituted over the past five years.

No.

39. Do you have any personal relationships, financial interests, investments or retainers which might conflict with the performance of your judicial duties, or which in any manner or for any reason might embarrass you? If so, please explain.

No.

40. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? ☒ Yes ☐ No

If not, please explain.

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41. Do you have any liens or claims outstanding against you by the Internal Revenue Service?  
☐ Yes ☒ No

If yes, please explain.

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42. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five (5) years? If so, please give details.

No.

43. Please explain your philosophy of public involvement and practice of giving your time to community service.



Giving back to my community arises in part from recognizing the good fortune I have been blessed with in my life.

Over time, my involvement in community issues has changed. This is primarily a result of starting a family later in life. After the birth of my first child Elizabeth eleven years ago, I found less time for the usual civil events, and my focus changed. Andy's arrival nine years ago kept me busy with new activities. I've come to learn coaching young children can be a great experience, often tempered by the realization I am without a clue how to handle twelve nine-year-old boys all wanting to kick soccer balls at me.

I see in this position an opportunity to become more active in adult public service, which is very important to me.

### **G. WRITING SKILLS**

44. In the last five years, explain the extent you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I perform my own research and writing. Most often I recognize an issue, research it and then discuss it with opposing counsel. Given the nature of most practitioners in this area, a consensus is usually reached as to the particular issue(s).

I have been involved in approximately seven cases before the Montana Supreme Court wherein I was primarily responsible for research and briefing. In approximately five others the research and briefing was a collaborative effort.

45. If you have engaged in any other types of "legal writing" in the last five years, such as drafting documents, etc., please explain the type and extent of writing you have done.

I commonly draft settlement agreements, parenting plans, real estate contracts, leases, partnership agreements and wills.

46. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.

See attached.

47. What percentage of your practice for the last five years has involved research and legal writing?  
20 %

48. Are you competent in the use of Westlaw and/or Lexis?

Lexis.

## H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

My primary non-work activity centers around my family.

My secondary passion is grade school, high school and collegiate wrestling events. I am a Master official in the Montana High School Association and Montana Officials Association. I am also certified as an NCAA wrestling official. I have officiated at the Montana All-Class High School Wrestling Tournament beginning about 20 years ago. I have served as the Head Official at many of those tournaments. I have officiated at several collegiate national finals tournaments and most recently was asked to be the Official-in-Charge at the National Junior College Athletic Association Finals Tournament.

50. Describe the jobs you have held during your lifetime.

Montana Forestry Department, Missoula – reforestation program, Summer & Fall 1976

Beekeeper in Missoula, MT – collecting and extracting honey, Summer 1977, 1978, 1982

Teamster in Boston, MA – Warehouseman, Drivers & Helpers Union, Summer & Fall 1979

Harvard Co-op Society, Cambridge, MA – bookkeeping, Summer 1980 to Fall 1981

51. Please identify the nature and extent of any pro bono work that you have personally performed during the past five years.

I followed the lead of my partner Frank Altman and made myself available to people without sufficient resources. This service ranges from handling adoptions, estate probates or contested dissolution cases to preparation of simple documents such as deeds or bills of sale. Local attorneys know I am likely to provide mediation services related to *pro bono* cases they have. I cannot quantify the hours spent doing *pro bono* work. However, I am comfortable in saying few lawyers spend more of their time in such endeavors.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

The two most influential men in my professional life were my former partner Frank Altman and Francis McCarvel.

Upon coming to Havre in 1984, I worked daily with Frank Altman. He set an example of hard work, dedication to the client and integrity. At the time, like most young men, I did not fully appreciate how lucky I was to have that standard set without any overt pressure, just quiet consistency.

My first client was a deliberate homicide defendant. After about four months of being overwhelmed by Special Prosecutor Marc Racicot, I swallowed my pride and asked for help. Once again I was blessed with great luck. Francis McCarvel, a true believer in the underdog and a very experienced criminal

defense lawyer, came to my rescue. Francis and I became close friends over the years we shared that client. His respect for the system and all its participants was exceptional. My time with him reinforced my attitude regarding treating everyone with respect. He helped illuminate how important each party was, regardless which side you were on.

That first case consumed much of my life for about two years, ultimately going to the Montana Supreme Court. The opportunity to watch Messrs. McCarvel and Racicot do what they did best was the most valuable learning experience in my professional life.

That same case involved me in many new issues – legal, ethical and personal. It took many years for me to begin developing the proper perspective on how those men and that case helped to form the lawyer I am today. If you had the good fortune to know Frank Altman and/or Francis McCarvel, you could understand the impact they had on me. I think of them often and hope to continue to serve the legal profession in a way that brings honor to their memory.

53. In the space provided, explain the qualities which you believe to be most important in a good District Court Judge.

Commitment to the duties of this position is critical.

To best fulfill the duties of a District Court judge, one should have the experience borne of handling many legal issues combined with life experience, because it is in the District Court where the law and life meet every day.

Humility will allow a judge to remain open and receptive to opportunities to learn.

Appreciating the impact of the Court on all the parties directly involved and the larger society requires compassion and awareness of the value of each person.

There is certainly a need for some degree of pragmatism. The Court has a responsibility to achieve the best result in a prompt and reasonable manner. Often, giving an answer provides the parties with relief, even if they hoped for a different answer.

As an attorney, I very much appreciate judicial consistency. A court which maintains consistent and well-founded positions is invaluable. It allows lawyers to provide better guidance to their clients.

I have seen how maintaining the proper temperament is essential to courtroom management.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A judge's first obligation is application of the law to the facts. Where factual scenarios may not fit perfectly with written law, a court needs to look to the history of case law for an answer. Relying on established precedent helps individuals make decisions about their future conduct. Society functions better if we know the rules.

Having said the above, I am compelled to say it is not realistic to believe every situation will be clearly defined by statutes, rules or case law. This is becoming more true as changes in our society come about more rapidly. More often than not, the law is built by reaction instead of being done proactively. Binding oneself to terms such as “strict constructionist” seems a way to ignore the conflict between existing law and unforeseen developments.

Finally, as a trial court judge the opportunities to vary from precedent should be more limited than in the appellate courts.

55. In the space provided, state the reasons why you are seeking office as a District Court Judge.

After receiving so much encouragement, I began to reflect on this unexpected opportunity and whether to apply. I see it as an opportunity to serve my profession and my community. It also presents a huge new challenge, which I see as something positive for me.

I believe my professional history, integrity, temperament and commitment allow me to bring the best attributes to the bench. My varied legal experience makes me familiar with the issues and problems commonly presented to the court. I understand how the court system affects the citizens it serves. I have a long history of clearly recognizing issues, confronting them and achieving resolution.

I believe I am the right person at the right time.

56. What items or events in your career have distinguished you or of which you are most proud?

I am most proud of the professional relationships I have built and maintained during 26 years of practicing law. I understand it is immodest and self-serving to cite one’s own high level of ethical conduct. However, I believe the people I deal with every day know I am to be trusted.

My conduct was initially shaped by the influence of my parents Myron and Evelyn Boucher. Their expectation of honesty was consistent with my early mentors in the legal practice. It was not even considered a possibility to misrepresent the facts or law to opposing counsel or the court. Because I continue to maintain that standard, I am comfortable inviting this Commission to contact any attorney in the 12th Judicial District, or anywhere near.

This extends beyond my professional peers. Even though I have spent much time on the other side of cases brought by law enforcement, I am confident they are comfortable with my integrity. As a result of this history I have gained the trust of people involved every day in our system – Clerks of Court, Judges, court reporters, juvenile and adult probation officers, protection social workers, police, sheriff’s and highway patrol officers, and counsel.

I am also very proud of providing a voice for people who otherwise are not heard. It is easier to represent only people with resources, but it is rewarding in a different way to act for those of lesser means.

57. State any pertinent information reflecting positively or adversely on you which you believe should be disclosed to the Judicial Nomination Commission.

I believe one of the most important aspects of my qualifications is the degree of local support that has developed. Even prior to Judge Rice's formal announcement I began receiving calls and visits from people encouraging me to apply. As stated above, this came from people in every facet of our judicial system. It has been encouraging and humbling to receive the support I have.

I have the confidence of those who are most affected by someone serving as District Court Judge. It is my sincere hope to have the opportunity to maintain and build upon that trust and confidence.

58. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best District Court Judge candidate?

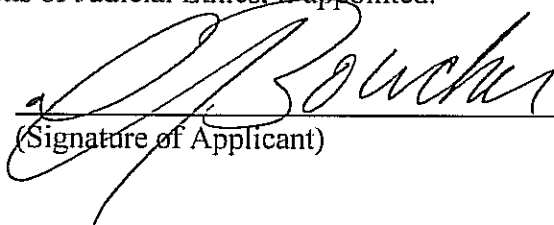
I do not know who else may submit an application, and I am reluctant to risk sounding like a negative campaign advertisement. I believe my experience in this District Court is unique; particularly my familiarity and experience with its daily operations. I have spent a lot of time there and would like to believe it has run more smoothly as a result of my participation. My ties to this community are strong and widespread. I have dealt with the issues affecting our citizens on an up-close and personal basis for two and a half decades.

In my years of officiating high school and collegiate athletics, I have been in stressful situations which demanded a decision immediately. This is routine when one officiates at the levels I have. Sometimes the stakes are high, at least to those involved. More often than not someone will be dismayed by that decision. All that I ask of new officials that I train is to know the rules thoroughly, apply them fairly and consistently, and do the best you can every time. That experience has helped me develop a thick skin and even temperament. These are attributes critical to this position.

### **I. CERTIFICATE OF APPLICANT**

I understand the submission of this application expresses my willingness to accept appointment as District Court Judge for the 12<sup>th</sup> Judicial District of the State of Montana, if tendered by the Governor of the State of Montana, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Canons of Judicial Ethics, if appointed.

October 1, 2010  
(Date)

  
(Signature of Applicant)

# **WRITING SAMPLE**

### **STANDARDS OF REVIEW**

This Court reviews the application of law to the facts under an abuse of discretion standard. An abuse of discretion in this context applies if the district court fails to apply correct law or applies inappropriate law. State v. Gallgher, 2001 MT39, 304 Mont. 215, 19P.3d 817. Interpretations of law are reviewed under a de novo standard. Supola v. Montana Department of Justice (1996) 278 Mont421, 925P.2d 480. Finally, the sufficiency of evidence supporting a district court's finding of guilty is conducted by viewing the evidence in a light most favorable to the prosecution and then determining whether a rational trier of fact could find the elements of the charged offense were proven beyond a reasonable

doubt.

### **ARGUMENT**

MCA Section 45-7-401, states in relevant part, as follows:

A public servant commits the offense of official misconduct when in his official capacity he... with the purpose to obtain advantage for himself or another, performs an act in excess of his lawful authority.  
MCA § 45-7-401(3).

The source of the present version of this statute was the Illinois Criminal Code. Illinois C.C. 1961, Chapter 38 § 33-3. The Criminal Law Commission Comments on the statute clearly set forth the basic premise that an underlying act serving as the basis for a charge of official misconduct must involve intentionally acting in contravention of a regulation or statute.

This sentiment is echoed in the Compiler's Comments found in MCA Annotations to 45-7-401.

Even more specifically the Annotator's Note distinguishes the various subsections of MCA Section 45-7-401 by noting the distinction between failure to perform a mandatory duty as proscribed under Section 45-7-401(1)(a) and acting in excess of lawful authority under subsection (1)(c). Schmidt was charged under the latter subsection.

When setting forth its reasons for denying Schmidt's motion, the District



Court acknowledged the statute itself does not establish substantive duties or obligations upon public servants. TR174 line 23-25, 175 1-2. That statement is consistent with an opinion of the Montana Attorney General. 40 A.G.Op.32 (1984). It is also consistent with the Commission Comments set forth above.

Given that MCA Section 45-7-401 does not alone create the duties or obligations of public servants, it logically follows that there must be an underlying source which sets the standard for prohibited behavior.

Schmidt was charged with performing an act in “excess of his lawful authority” with the purpose to obtain advantage. MCA § 45-7-401(1)(c). The district court recognized this element required some other regulation or statute to be the defining source of a probation officer’s lawful authority. TR.175, lines 2-4. Again, this is consistent with the Commission Comments.

In essence the State had to establish a purposeful act which is contrary to law as set forth by regulation or statute. Compilers Comments on MCA 45-7-401 MCA Annotations.

At trial the State failed to present any regulation or statute which proscribed the development of a personal or intimate relationship between a probationer and a probation officer. This is because no such regulation or statute exists.

In contrast there are recently enacted proscriptions related to other public

servants employed by the Department of Corrections (DOC). In 1999 the DOC requested Senator Duane Grimes sponsor legislation designed to address a perceived lack of necessary protection for incarcerated individuals. His proposed legislation under Senate Bill 32 served to amend MCA Section 45-5-501 and its definition of “without consent” used in our rape statute. It also amended MCA Section 45-5-502 regarding the offense of sexual assault. 1999 Legis. Hist. Chapter 84. Prior to enactment of the amendments there was no criminal penalty for guards or detention officers having consensual sexual involvement with persons held in correctional, detention or treatment facilities.

As a result of the amendments, consent cannot be given, or is ineffective if given, when the sexual activity involves incarcerated persons and those employed by the holding facility.

The legislature had an opportunity to include circumstances beyond those involving incarcerated persons and those working as guards. They could have included probationers, probation officers, police officers, prosecutors and criminal defendants, etc. However, the amendments were narrowly defined and do not include reference to probationers or probation officers.

As a result, the State in the instant case sought to stretch the meaning of MCA Section 45-7-401 beyond any reasonable interpretation in order to charge

Schmidt with a criminal offense. In order to meet this burden the State offered MCA Sections 46-23-1001, 46-23-1004 and 46-23-1011 as providing the source of the statute or regulation violated by Schmidt. Those statutes, as offered to the District Court, are attached as App. C.

In making its arguments the State relied primarily upon MCA Section 46-23-1011(3). TR163, lines 17-25; 164 1-8.

There are fatal problems with the State's reliance on this statute. First, and most obviously, there is no proscription against intimate involvement with a probationer. Thus, no related limitation on a probation officer's lawful authority. Recognizing the obvious, the State was reduced to arguing that Schmidt did not meet the general standards of MCA Section 46-23-1011(3). That subsection states as follows:

The probation and parole officer shall regularly advise and consult with the probationer to encourage the probationer to improve the probationer's condition and conduct and shall inform the probationer of the restoration or rights on successful completion of the sentence.

There was no evidence that Schmidt did not regularly advise and consult with his probationer. There was no evidence that Schmidt failed to encourage the probationer to improve her condition and conduct. Nor was there any evidence that Schmidt failed to inform her of the possible restoration of rights upon

completion of the sentence.

If there had been such evidence it would not have related to the particular offense charged against Schmidt. It may have had some application under MCA Section 45-7-401(1)(a) which relates to purposely or negligently failing to perform any mandatory duty as required by law or a court of competent jurisdiction. However, the State chose not to proceed under that provision. That decision certainly arose from the lack of supporting evidence.

At trial, the State was ultimately compelled to reduce its case to the sole premise that because Schmidt did not have express authorization to engage in sexual activity of any sort with the probationer, he had to have been acting in excess of his lawful authority. TR168, line 9-13.

That position is contrary to the premise of Section 45-7-401 as set forth in the Comments. It is also contrary to common sense. By the State's argument a probation officer would violate law by a limitless number of simple acts occurring in daily societal interaction.

Examples of such were touched upon by the District Court. If Schmidt sold a used vehicle to a probationer, he would probably do so for his advantage and presumably for the probationer's advantage. Something as simple as a probation officer asking for and receiving a cigarette from a probationer would fall into the

same category. These acts are not expressly authorized under MCA Section 46-23-1011 or anywhere else.

In essence, the State argues that any act not expressly authorized and which benefits any person, including the probation officer or any other person, is in violation of the official misconduct statute. All actions of public servants would have to be defined in a specifically stated code. Any beneficial act not so defined leads to official misconduct even if not in contradiction to any regulation or statute.

If the State continues with the same arguments presented to the district court, the undersigned hopes the State will answer some obvious questions raised by such arguments. For example, would the State criminally prosecute every public servant engaging in sexual banter while on duty? If so, would that apply to situations where all parties involved were consenting and even participating in such activity? Would two public servants involved in consensual intimate contact while on duty face criminal charges even if married to each other? These examples are made more glaring where the public servant is subject to being on duty 24 hours a day such as expressed by the district court in this case. TR174, line 2.

Simply put the State's position regarding "lawful authority" is absurd.

At this point it would be helpful to consider that MCA Section 45-7-401 does not limit any action taken by civil regulation. As stated in the Comments:

The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service.

During argument in district court it was acknowledged that probation officers engaging in intimate activity with those under their supervision may not be exercising good judgment. Such decisions could conceivably call for disciplinary action within the employment context. However, that does not necessarily lead to criminal culpability.